IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1660

Terrell Don Hutto, Sub Nom, James Mabry, Commissioner, Arkansas Department of Correction: Marshall N. Rush, Chairman, Arkansas Board of Correction: Eula Dorsey, Vice-Chairman, Arkansas Board of Correction: Thomas H. Wortham, M.D., Secretary, Arkansas Board of Correction: Richard E. Griffin, Member, Arkansas Board of Correction: And John Elrod, Member, Arkansas Board of Correction .... *Petitioners*

vs.

Robert Finney, et al ..... *Respondents*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

BILL CLINTON
Attorney General
State of Arkansas
Justice Building
Little Rock, Arkansas 72201
and ROBERT ALSTON NEWCOMB
Assistant to the Director
P. O. Box 8707
Pine Bluff, Arkansas 71611
Attorneys for Petitioners

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, reported as *Finney* v. *Hutto*, 548 F. 2d 740 (1977), appears in the Appendix to the Petition for Certiorari. The opinion of the United States District Court for the Eastern District of Arkansas is reported, *Finney* v. *Hutto*, 410 F. Supp. 251 (1976) and appears in the Appendix to the Petition for Certiorari.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on January 6, 1977. A timely petition for rehearing en banc was denied on February 3, 1977. A timely petition for extension of time was filed in this Court and Mr. Justice Blackman entered an Order Extending Time to File Petition for Writ of Certiorari to May 25, 1977. This Court granted Certiorari on October 17, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(c)(1).

QUESTIONS PRESENTED

I

Whether Public Law 94-559, The Civil Rights Attorney's Awards Act of 1976, authorized the awarding of attorney fees to be paid by a State, which was not a party to the suit?

II

Whether the Eleventh Amendment to the Constitution absolutely bars the award of attorney fees to be paid by a State?

III

Whether the Cruel and Unusual Punishment Clause of the Eighth Amendment prohibits the use of indefinite punitive isolation for serious infractions of prison discipline?

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Eleventh Amendment to the Constitution of the United States provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

STATUTORY PROVISIONS INVOLVED

Public Law 94-559, approved on October 19, 1976, states:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as 'The Civil Rights Attorney's Fees Awards Act of 1976.'
>
> Sec. 2. That the Revised Statutes section 722 (42 U.S.C. 1988) is amended by adding the following: 'In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, title IX of Public Law 92-318, or any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion,

may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs.' "

STATEMENT OF THE CASE

The petitioners are the Commissioner of Corrections and the Board of Correction for the State of Arkansas. In the district court they were the respondents and in the Court of Appeals, they were the appellants. The case involves the constitutionality of the Arkansas Department of Correction. This particular part of the case arose from the hearings held by the United States District Court after the decision of the Eighth Circuit Court of Appeals in *Finney* v. *Arkansas Board of Correction*, 505 F. 2d 196 (1974).

The Honorable J. Smith Henley, Circuit Judge, sitting by designation in *Finney* v. *Hutto*, 410 F. Supp. 251 (1976), ordered certain changes in the operation of the Arkansas Department of Correction but found many aspects of the operation of the Department of Correction constitutional. The petitioners did not challenge those parts of the district court order setting population ceilings for the institutions, prohibiting the serving of "grue", requiring the hiring of a full-time psychiatrist or psychologist, and requiring a study of the health care system of the Arkansas Department of Correction by the Arkansas Department of Health.

The petitioners sought review in the Court of Appeals of only three parts of the district court order: (1) the award of attorney fees, (2) the award of cost for travel and use of investigators, and (3) the prohibition against the use of indefinite punitive isolation.

In this Court the petitioners seek review of only two aspects of the case. The petitioners contend that the district court exceeded its jurisdiction in a suit brought pursuant to 42 U.S.C. § 1983, where it ordered the State of Arkansas to pay $20,000 to counsel for the respondents as attorney fees. The petitioners also contend that the Court of Appeals erred in awarding counsel for respondents $2,500.00 as attorney fees for services on appeal. The final contention of the petitioners is that the use of indefinite punitive segregation as punishment for serious violations of prison discipline does not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

The petitioners contend that Congress, by failing to amend 42 U.S.C. § 1983, when it passed Public Law 94-559 authorized suits against States pursuant to the statute did not create the authority for a United States District Court to award attorney fees against a State. It is further contended that under *Bradley* v. *The School Board of the City of Richmond*, 416 U.S. 696 (1974), that if Public Law 94-559 authorized the award of attorney fees it should not be applied retroactively because it abrogates the Eleventh Amendment rights of the State of Arkansas.

The second point of petitioners' argument is that the Eleventh Amendment to the Constitution of the United States bars the award of attorney fees to be paid by a State even when the award is based on the "bad faith" exception to the American rule prohibiting the awarding of attorney fees to the prevailing party.

The final part of petitioners' argument concerns the scope

of the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution of the United States. The petitioners contend that the District Court erred when it prohibited the use of indefinite punitive segregation because it served "no rehabilitative purpose." (p. 71, Appendix to Petition for Certiorari) The petitioners contend that *Gregg* v. *Georgia*, 428 U.S. 153, 49 L. Ed. 2d 859 (1976), established that rehabilitation was not a necessary goal before a particular form of punishment did not offend the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution of the United States.

ARGUMENT

I

PUBLIC LAW 94-559, THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, WAS IMPROPERLY APPLIED IN THIS CASE

Public Law No. 94-559 (Oct. 9, 1976) provides:

> "In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, Title IX of Public Law 92-318, or in any civil action proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost."

The petitioners respectfully submit that the language of Public Law 94-559 does not authorize a United States District Court or a United States Circuit Court of Appeals to make the State of Arkansas or any State pay attorney fees. The basis of petitioners' argument is that in passing the Civil Rights Attorney's Fees Awards Act of 1976, Congress failed to specifically amend 42 U.S.C. § 1983 to include a State as a party which could be sued pursuant to it.

The petitioners recognize that this Court in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 49 L. Ed. 2d 614 (1976) held that in a suit brought pursuant to 42 U.S.C. § 2000 et. seq. there was statutory authorization for the award of attorney's fees against a

State. It is respectfully contended that *Fitzpatrick*, supra, is not controlling in the instant case since Public Law No. 94-559 does not expressly contain "threshold . . . Congressional authorization" to allow a state to be named as a defendant in a suit brought pursuant to 42 U.S.C. § 1983. *Fitzpatrick*, supra, 49 L. Ed. 2d at 619.

42 U.S.C. § 2000 e (a) which was involved in *Fitzpatrick*, supra, is unlike the Civil Rights Attorney's Fees Award Act, Public Law 94-559, in that it expressly provided that those subject to suit include "governments, governmental agencies (and) political subdivisions." Public Law No. 94-559 did not amend 42 U.S.C. § 1983 to include a State as a person subject to the provisions of 42 U.S.C. § 1983.

> "The Civil Rights Act of 1871, 42 U.S.C. § 1983, had been held in *Monroe* v. *Pape*, 365 U.S. 167, 187-191, 5 L. Ed. 2d 492 (1961) to exclude cities and other municipal corporations from its ambit; that being the case, it cannot have been intended to include states as parties defendant." *Fitzpatrick*, supra, 427 U.S. at 452, 49 L. Ed. 2d at 619.

The Court of Appeals for the Eighth Circuit in affirming the award of attorney fees against the State of Arkansas in this case relied on certain statements contained in the legislative history of Public Law 94-559 as authority to compel the State of Arkansas to pay attorney fees in a case to which it was not a party. The petitioners contend that express statutory language allowing a State to be named as a party in 42 U.S.C. § 1983 actions is required before an award of attorney fees can be made against a state pursuant to Public Law 94-559.

Judge Muir in *Skehan* v. *Board of Trustees of Bloomsburg State*

College, 436 F. Supp. 657, 667 (M.D. Penn., July 20, 1977) stated: "In the absence of explicit statutory language subjecting the states to liability for damages and attorney's fees, this Court will not imply a limit to the state's immunity to suit under the Eleventh Amendment." This Court has stated: "It would . . . be surprising . . . to infer that Congress deprives [a State] of her constitutional immunity without changing the [statute] under which she could not be sued or indicating in some way by *clear language* that the constitutional immunity was swept away." *Employees of the Department of Public Health and Welfare* v. *Missouri*, 411 U.S. 279, 285 (1973) [emphasis added].

PUBLIC LAW 94-559 SHOULD NOT BE APPLIED RETROACTIVELY

Citing *Bradley* v. *The School Board of the City of Richmond*, 416 U.S. 696 (1974), and legislative history, the Court of Appeals found that Public Law No. 94-559 applied to this case even though the District Court had made the award of attorney's fees prior to the enactment of the statute.

The petitioners submit that *Bradley*, supra, is distinguishable from the instant case. In *Bradley*, supra, this Court dealt with 20 U.S.C. § 1617, which granted authority to a federal court to award a reasonable attorney's fee against a local educational agency, a state (or any agency thereof) or the United States (or any agency thereof) for violations of Title VI of the Civil Rights Act of 1964, or the Fourteenth Amendment, as they pertained to elementary and secondary education. Because the defendant in *Bradley*, supra, was a local school board, there was no discussion of a State's Eleventh Amendment protection or the propriety of retroactively applying legislation which would have a direct fiscal impact on a State's

treasury. Consequently, the reliance on *Bradley*, supra, ignores the fact that the State of Arkansas, unlike a local school board, is protected by the Eleventh Amendment.

The petitioners concede that as a general principle newly enacted legislation governs litigation pending at the time of its enactment unless clear legislative history to the contrary is present. But in *Bradley*, supra, 416 U.S. at 711, this Court noted "... that a Court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice. ... " It is respectfully contended that to apply Public Law 94-559 retroactively would be manifestly unjust.

> "The concerns expressed by the Court in *Schooner Peggy* and in *Thorpe* relative to the possible working of an injustice centered upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Bradley*, supra, 416 U.S. at 717.

The petitioners submit that the impact of Public Law 94-559, if it is applicable in this case, drastically changes the rights of the State of Arkansas and that the right changed by the statute is a constitutional right enjoyed by the State of Arkansas ever since it became a State. The petitioners can conceive of no greater right than one conferred by the Constitution of the United States and to change that right is very significant.

The impact of Public Law 94-559, if it is applicable to the State, is tremendous in that it directly affects the budgetary and fiscal policy of the State of Arkansas as expressed through the enactments of the Arkansas General Assembly. To hold that Public Law 94-559 is retroactively applicable to the State of

Arkansas would be to create the potential for chaos in the operation of State government. Amendment 13 to the Constitution of the State of Arkansas prohibits deficit spending by the State. Therefore, the payment of attorney's fees by the State of Arkansas requires that money appropriated for other purposes has to be diverted from the purpose intended by the legislature to satisfy the judgment entered by a United States District Court. The forced reallocation of already appropriated funds is fundamentally unfair to the State of Arkansas and has a serious impact on the right of the Arkansas Legislature to determine how the fiscal affairs of the State are going to be conducted.

Conceding that pursuant to *Fitzpatrick*, supra, the Eleventh Amendment can be modified by proper Constitutional action, there is no rational basis for allocating to Congress the plenary and non-reviewable power to thwart the Eleventh Amendment retroactively. This is especially true in the instant case, in which (1) there is no specific mention that Public Law 94-559 applies to a State, (2) a State cannot be joined as a defendant under *Monroe* v. *Pape*, supra, and (3) the fiscal consequences to the State of Arkansas are significant. While the protection afforded the States since 1789 by the Eleventh Amendment may now, in some situations, be altered by Congress, due process demands that the States at least be given notice that significant sums in the future will have to be set aside for attorney's fee awards.

Therefore, the petitioners pray that this Court will vacate the award of attorney fees made by the District Court and the Court of Appeals.

II

THE ELEVENTH AMENDMENT PROHIBITS THE AWARD OF ATTORNEY FEES TO BE PAID BY A STATE

The petitioners respectfully submit that requiring the State of Arkansas to pay attorney fees is the same as an award of damages against the State based upon asserted prior misconduct by state employees. The petitioners contend that the Eleventh Amendment bars the award of attorney fees even if the State of Arkansas had acted in bad faith in this litigation.

The Court of Appeals in affirming the district court's award of $20,000.00 in attorney fees to be paid by the State of Arkansas relied on P. L. 94-559 and the finding of bad faith on the part of the petitioners by the district court. The Court of Appeals stated:

> "Although, in view of the statute, we are not required to pass on the issue of bad faith, the record fully supports the finding of the district court that the conduct of the state officials justified the award under the bad faith exception enumerated in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 258-259, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)." *Finney* v. *Hutto*, 548 F. 2d at 742, ftn. 6.

The United States District Court for the Eastern District of Arkansas awarded attorneys' fees to counsel for the petitioners in the sum of $20,000.00. The Court also awarded costs totaling a maximum amount of $2,000.00. The District Court directed that "these awards are to be paid out of Department of Correction funds." (p. 90 Appendix to Petition for Certiorari).

The Department of Correction is an agency of the State of Arkansas created by the first extraordinary session of 1968 of the Arkansas Legislature. (Ark. Stat. Ann. § 46-100 et seq., Supp. 1975). The Eleventh Amendment to the Constitution of the United States provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

While the Amendment does not bar suits against the state by its own citizens, this Court has consistently held that an unconsenting state is immune from suits brought in federal courts by its own citizens as well as by citizens of another state. See *Edelman* v. *Jordan*, 415 U.S. 651, 662-663 (1974), and cases cited therein. The petitioners contend that the State of Arkansas was not a party to this action, but the order of the District Court awarding attorneys' fees clearly requires that the payment be made from the treasury of the State of Arkansas. (*Finney*, supra, F. Supp. at 285).

> "It is also well established that even though a state is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. In *Ford Motor Company* v. *Department of Treasury*, 323 U.S. 459, 89 L. Ed. 389, 65 S. Ct. 347 (1945), the Court said, '(W)hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officers are nominal defendants.' Id. 464, 89 L. Ed. 389. Thus, the rule has evolved that a suit by private

parties seeking to impose a liability which must be paid from public funds and the State treasury is barred by the Eleventh Amendment." *Edelman*, supra, U.S. at 663.

Petitioners submit that the State of Arkansas has not waived its sovereign immunity by operating a prison system, which rightfully can be subject to suits for injunctive relief under 42 U.S.C. § 1983. This court in *Edelman*, supra, dealt with the issue of waiver of sovereign immunity and found that:

> "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction.' " *Edelman*, supra, 673, L. Ed. 2d at 678 (citations omitted).

Therefore, it is clear that the award of attorneys' fees cannot be predicated on a waiver of the Eleventh Amendment defense by the State of Arkansas solely because it has chosen to operate a prison system. The State of Arkansas clearly has not consented to being sued, and under its Constitution cannot waive the defense of sovereign immunity. The Arkansas Constitution provides, "The State of Arkansas shall never be made defendant in any of her courts." Ark. Const. Art. 5 § 20 (Ark. Stat. Ann. Vol. 1). See also *Pitcock* v. *State*, 91 Ark. 527, 121 S.W. 2d 742 (1909).

The Circuit Court of Appeals which have dealt with the award of attorneys' fees subsequent to the decision in *Edelman*,

supra, have reached conflicting results. In *Jordan* v. *Gilligan*, 500 F. 2d 701, 705 (6th Cir. 1974), cert. den., 421 U.S. 991, the Court stated:

> "Does a Federal Court have the power to award attorneys' fees against a state or its officials acting in their official capacity in a suit brought under 42 U.S.C. § 1983 to vindicate constitutional rights? To this inquiry we must respond in the negative."

Accord, *Taylor* v. *Perini*, 503 F.2d 989, 901 (6th Cir. 1975), vacated on other grounds at 421 U.S. 982; *Named Individual Members, San Antonio Conservation Society* v. *Texas Highway Department*, 492 F. 2d 1017 (5th Cir. 1974), cert. den. 420 U.S. 926; *Hallmark Clinic* v. *North Carolina Department of Human Resources*, 519 F. 2d 1315, 1317 (4th Cir. 1974). Contra; *Jordan* v. *Fusari*, 496 F. 2d 646 (2nd Cir. 1974).

The district court in the instant case based its decision on the principles that attorneys' fees can be awarded against the State as ancillary to prospective equitable relief and if the case was litigated in "bad faith". (*Finney*, supra, 410 F. Supp. at 284 and 285).

Petitioners believe that neither of these theories abrogate the Eleventh Amendment's prohibition against awarding money judgments against an unconsenting state. The petitioners realize that this Court in *Ex Parte Young*, 209 U.S. 123 (1908), recognized that injunctive relief can be granted even though it will have a prospective effect on the state treasury. Petitioners' position is that the Circuit Courts of Appeal which have followed the "ancillary effect" doctrine have misinterpreted *Edelman*, supra. The term "ancillary effect" as used in

Edelman, supra, came at the conclusion of a paragraph discussing *Ex Parte Young*, supra. The phrase was clearly delineated in the following paragraph and cannot be used to support the award of attorneys' fees. This Court stated:

> "But the portion of the District Court's decree which petition challenges on Eleventh Amendment grounds goes much further than any other cases cited. It required payment of State funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when the petitioner was under no court-imposed obligation to conform to different standards. While the Court of Appeals described this retroactive award of monetary relief as a form of 'equitable restitution,' it is in practical effect indistinguishable in many respects from an award of money damages against the State . . . . It is measured in terms of a monetary loss resulting from past breach of a legal duty on the part of the defendant state officials.
>
> "Were we to uphold this portion of the District Court's decree, we would be obligated to overrule the Court's holding in *Ford Motor Company* v. *Department of Treasury*, supra. There a taxpayer, who had, under protest, paid taxes to the State of Indiana, sought a refund of those taxes from the Indiana State officials who were charged with their collection. . . . The term 'equitable restitution' would seem even more applicable to the relief sought in that case, since the taxpayer had at one time had the money, and paid it over to the State pursuant to an allegedly unconstitutional tax extraction. Yet this Court

> had no hesitation in holding that the taxpayer's action was a suit against the State, and barred by the Eleventh Amendment. We reach a similar conclusion with respect to the retroactive portion of the relief awarded by the District Court in this case." *Edelman*, supra, U.S. at 668-669.

Therefore, *Edelman*, supra, clearly establishes that the Eleventh Amendment is a complete bar to the awarding of attorneys' fees against the State since such an award represents a direct levy on the State treasury and has a direct impact on the fiscal affairs of the State of Arkansas.

Petitioners realize that the other ground used by the District Court and the Court of Appeals to award attorneys' fees, "bad faith," is a recognized exception to the normal American rule prohibiting the awarding of attorneys' fees to the prevailing party. *Alyeska Pipe Line Company* v. *Wilderness Society*, 421 U.S. 240 (1975).

The "bad faith" exception should not be applicable in a case involving the award of attorneys' fees against a state. Although certain courts have taken the position that *Sims* v. *Amos*, 340 F. Supp. 691, 694 (N.D. Ala. 1972), aff'd, 409 U.S. 942, stands for the proposition that attorneys' fees may be awarded when there is "bad faith" notwithstanding the Eleventh Amendment, that reliance on *Sims*, supra, is not well founded. It should be noted that in *Murgea* v. *Massachusetts Board of Retirement*, 386 F. Supp. 179, 182 (D. Mass. 1972), aff'd 421 U.S. 972, a three-judge panel denied attorneys' fees ". . . both as a matter of law, and as a matter of discretion." This case, just as *Sims*, supra, was summarily affirmed by this Court. It should be further noted that except for *Sims*, supra, all the other cases cited by this Court in *Alyeska Pipeline Company*, supra, concerning

"bad faith" involved parties other than states.

Therefore, petitioners respectfully contend that *Sims*, supra, cannot be considered controlling authority. In discussing the effect of affirmances of three-judge panel decisions this Court in *Edelman*, supra, U.S. at 670-671 stated:

> "This Court, while affirming the judgment, did not in its opinion refer to or substantively treat the Eleventh Amendment argument. Nor, of course, did the summary dispositions of the three district court cases contain any substantive discussions of this or any other issue raised by the parties. . . . Equally obvious (summary affirmances) are not of the same precedential value as would be an opinion of this Court treating the question on the merits."

The petitioners pray that this Court will reverse the award of attorney fees by the Court of Appeals and the District Court, since

> "(t)he history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a nonconsenting state." *Employees of Department of Public Health & Welfare*, supra, 411 U.S. at 284.

III

THE EIGHTH AMENDMENT DOES NOT PROHIBIT THE USE OF INDEFINITE PUNITIVE SEGREGATION

The District Court in enjoining the use of indefinite punitive isolation stated: ". . . punitive isolation as it exists at

Cummins today serves no rehabilitative purpose, and that it is counter-productive. It makes bad men worse. It must be changed." *Finney* v. *Hutto*, 410 F. Supp. at 277 and (p. 71 of Appendix to Petition for Certiorari). The Court of Appeals for the Eighth Circuit affirmed the District Court on the ground that indefinite punitive isolation constitutes cruel and unusual punishment. *Finney* v. *Hutto*, 548 F. 2d at 741, 742 and (p. 4 of Appendix to Petition for Certiorari).

The petitioners submit that the District Court and the Court of Appeals erred in holding that indefinite punitive isolation was cruel and unusual punishment because they failed to apply the proper test of what constitutes cruel and unusual punishment and failed to give proper consideration to the opinions of the prison officials.

The test of what constitutes cruel and unusual punishment consists of:

> "First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime." *Gregg* v. *Georgia*, 428 U.S. 153, 49 L. Ed. 2d 859, 875 (1976).

This test does not preclude a particular form of punishment because it serves no rehabilitative purpose. The idea advanced by the District Court and affirmed by the Court of Appeals that indefinite punitive isolation is impermissible because it makes "bad men worse" and serves no rehabilitative purpose is not a proper test to determine if a prison practice violates the constitution. The Court of Appeals for the First Circuit has recently stated: ". . . we are not persuaded that courts'

occasional references to the penological purposes served by various punishments establishes a constitutionality based test for reviewing prison practices." *Nadeau* v. *Helgemoe*, 561 F. 2d 411, 416 (Aug. 24, 1977). The Fifth Circuit Court of Appeals has noted:

> "The mental, physical, and emotional status of individuals, whether in or out of custody, do deteriorate and there is no power on earth to prevent it. . . . If the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight. The Constitution does not require that prisoners, as individuals or as a group, be provided with any and every amenity which some person may think is needed to avoid mental, physical, and emotional deterioration." *Newton* v. *Alabama*, 559 F. 2d 283, 291 (Sept. 16, 1977).

The practice of indefinite sentences to punitive isolation for violation of prison disciplinary rules has been upheld by two Circuit Courts of Appeal. In *Sostre* v. *McGinnis*, 442 F. 2d 178, 193 (2nd Cir., En Banc, 1971), it was stated:

> ". . . The Eighth Amendment (does not forbid) indefinite confinement under the conditions endured by Sostre for all the reasons asserted by Warden Faollette until such time as the prisoner agrees to abide by prison rules — however, counter-production as a correctional measure, or however personally abhorrent the practice may seem to some of us."

The position of the Court of Appeals in *Sostre*, supra, was

reaffirmed in *Mukmuk* v. *Commissioner of the Department of Correctional Services*, 529 F. 2d 272, 277 (2nd Cir., 1976), where the Court said:

> "We have held it permissible to keep a prisoner in segregation until he agrees to abide by the rules of the institution."

The Court of Appeals for the Fifth Circuit in *Novak* v. *Beto*, 453 F. 2d 661 (1971), Rehearing and Rehearing En Banc denied, 456 F. 2d 1030 (1972) noted:

> "There is also, of course, a vigorous debate over the comparative roles of punishment and rehabilitation in the correctional stage of our criminal justice system. It is not our place, however, to resolve that debate. We think it is enough simply to say that, as of now, deterrents and punishment still have an active place in our prisons. It is beyond dispute, of course, that order must be maintained in the prisons. When a prisoner continues to break prison rules even after losing such privileges as going to the movie and being assigned extra work, the authorities must have some harsh measure to induce compliance with prison regulations."
>
> "Our role as judges is not to determine which of these treatments is more rehabilitative than another, or which is more effective than another. The constitution does not answer such questions. The scope of our review is very limited under the cruel and unusual punishment clause." 453 F. 2d at 670.

The petitioners pray that since the District Court failed to

find that indefinite punitive isolation, "involve[d] the unnecessary and wanton infliction of pain" or was "grossly out of proportion" to the offense that this Court will dissolve the injunction prohibiting indefinite punitive isolation. *Gregg* v. *Georgia*, id.

The petitioners further submit that the District Court erred in not giving proper consideration to the views of the prison officials concerning the need for the use of indefinite punitive isolation. Mr. Hutto, Commissioner of Correction, testified: "The purpose of the punitive wing is quite simple. It is to provide the administration with the necessary measure of control to maintain the safety and the order and well-being of all the inmates and staff who have to work in that institution and have to live in that institution." (*Graves & Terry* v. *Lockhart*, PB-74-C-81, 107, 118, Vol. 1 of 1, p. 147, incorporated into *Finney, et al* v. *Hutto, et al*, by the District Court, March, 1976.)

Mr. Hutto also stated: "As a general rule, most inmates do not stay in punitive isolation for a period even up to 15 days. But there are some who are very recalcitrant and hostile, who refuse, for example, to accept any work assignment, and there is little choice that we simply can't say to them at the end of 15 days, 'Well, even though you still maintain stoutly that you are not going to work, and you're not going to participate in the programs, we can forgive all now and you can do what you want to.' "It just becomes a question of who is going to run the institution, the inmates or the staff." (Tr. Vol. 23, p. 47)

In describing punitive segregation and the mechanism used for sentencing a person there by the Arkansas Department of Correction the District Court stated:

> "It seems clear, . . . that if the prison administration commits folks who refuse to work or who are insubordinate about work at times in much the same way that a Court can commit a man for contempt, civil contempt; that is, on the theory that he holds the key, the prisoner holds the key, and when he wants to work he can come out any day." (*Graves & Terry* v. *Lockhart*, supra, p. 100, 101.)

There was no evidence introduced in the District Court to show a systematic abuse of punitive isolation. Mr. A. L. Lockhart, Superintendent of the Cummins Unit, testified that for the year preceding June 14, 1974, the average stay in punitive isolation had been fourteen days. Respondents' Exhibit Number 691 clearly shows that very few inmates spend more than fifteen days in punitive isolation. (Tr. Vol. 23, p. 84). The appellants respectfully submit that the use of an indefinite sentence to punitive isolation is not cruel and unusual punishment where there is a review and the decision for or against release is based upon valid panel considerations. If an inmate who has been assigned to punitive isolation will not behave during that period of time or still refuses to perform his job assignment, the prison administration should not have to release him. If they did there would be no method of compelling inmates to perform work assignments.

The imposition of the punishment of punitive segregation is not generally the first choice of punishment, except in cases involving major violation of the institutional rules.

> "Punitive isolation is ordinarily used as a punishment when reprimands, minor disciplinaries, loss of privileges, suspended sentences, and similar measures have been tried without satisfactory results. It is a major disciplinary

measure and will be used when other forms of action prove inadequate, where the safety of others is concerned, or when the serious nature of the offense makes it necessary." (Pgs. 29-30 of Respondents' Exhibit No. 693 introduced in Vol. 23, p. 85 of *Finney* v. *Hutto*.)

As noted by Chief Justice Burger:

"Prisons, by definition, are closed societies populated by individuals who have demonstrated their inability, or refusal, to conform their conduct to the norms demanded by a civilized society. Of necessity, rules far different than those imposed on society at large must prevail within prison walls. The federal courts, as we have often noted, are not equipped by experience or otherwise to 'second guess' the decisions of state legislatures and administrators in this sensitive area except in the most extraordinary circumstances." *Jones* v. *North Carolina Prisoners' Union*, ____ U.S. ____, 53 L. Ed. 2d 629, 646 (concurring opinion) (June 23, 1977)

The petitioners pray that since the District Court and the Court of Appeals failed to give any consideration to the views of the prison administrators concerning the need for indefinite punitive isolation, that this Court dissolve the injunction prohibiting the use of indefinite punitive isolation as a form of punishment for major violations of prison regulations.

CONCLUSION

For the above stated reasons the petitioners pray that this Court will reverse the judgment of the United States Court of Appeals insofar as it awarded $2,500.00 as attorney fees and upheld the District Court's award of $20,000.00 in attorney fees and injunction prohibiting indefinite punitive isolation.

Respectfully submitted,

BILL CLINTON
Attorney General
State of Arkansas
Justice Building
Little Rock, Arkansas 72201
and ROBERT ALSTON NEWCOMB
Assistant to the Director
P. O. Box 8707
Pine Bluff, Arkansas 71611
Attorneys for Petitioners